IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VLADISLAV BARANENKO and ARATI MAHAJAN, on behalf of themselves and all others similarly situated, **Plaintiffs,** **-against-** **MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MERRILL LYNCH & CO., INC., and BANK OF AMERICA CORPORATION,** **Defendants.**	**11 CV 2405 (PGG)**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR STRIKE PORTIONS OF PLAINTIFFS' AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs Vladislav Baranenko and Arati Mahajan (collectively "Plaintiffs"), by their attorneys, Fitapelli & Schaffer, LLP, submit this memorandum in opposition to Defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated, Merrill Lynch & Co., Inc., and Bank of America Corporation (collectively "Defendants") motion to dismiss and/or strike Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(f) ("Defendants' Motion").

Pursuant to the Amended Complaint, filed May 12, 2011, Plaintiffs seek to recover overtime compensation pursuant to the FLSA. (*See* Docket No. 7, Amended Complaint.) Plaintiffs and similarly situated individuals were improperly misclassified as exempt employees, and therefore did not receive overtime compensation for hours worked in excess of 40 per week. Defendants erroneously argue that, contrary to the FLSA, the severance agreements Plaintiffs were required to sign upon the termination of their employment estop them from entitlement of overtime wages under the FLSA, and waive their rights to bring individual actions or a collective action. For the reasons set forth below, it is respectfully submitted that Defendants' position is incompatible with the protections afforded under the FLSA. Thus, Defendants are unable to meet their burden to dismiss or strike Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(f), and their motion must be denied in its entirety.

BACKGROUND

Plaintiffs and the putative class are current and former Senior Specialists employed by Defendants. The Senior Specialist position is a "back office" position consisting mainly of inputting data into template forms and confirming trades that are executed by others. Originally classified as an overtime exempt position, the position was re-classified as overtime eligible in or around September 2009. Prior to the reclassification, Senior Specialists worked well over 40 hours per week with no overtime compensation. Post re-classification, Senior Specialists continued to work over 40 hours per week, but were still not compensated for overtime hours because they were instructed by their supervisors not to record all of the hours they worked.

During the economic downturn, many Senior Specialists (including named Plaintiffs) signed severance agreements upon the termination of their employment. Those receiving severance were offered two week's pay for every year of service, per Defendants' severance compensation plan. No compensation was furnished for unpaid overtime. Nevertheless, the severance agreements contained a clause that purports to release Defendants from claims arising under the FLSA. (*See* Defendants' Motion to Dismiss and/or Strike Portions of Plaintiffs' Amended Complaint ("Defendants' Motion"), Exhibit A and B ¶ 3(a).) The agreements also purport to waive an individual's right to bring a collective action for any claim identified and waived in the severance agreement, including FLSA claims. (*See* Id. ¶ 3(b).)

Defendants now claim that this agreement should estop Plaintiffs from asserting individual FLSA claims, and bar them from bringing forth a collective action on behalf of others who are similarly situated. Defendants' estoppel argument hinges upon their implausible claim that they were "mislead" into giving Plaintiffs their predetermined severance amount (two week's pay per year of service) per the Corporate Severance Program ("CSP"). Additionally, Defendants erroneously contend that language within the severance agreement, stating that Plaintiffs had been paid for all hours worked, should estop Plaintiffs from pursuing their FLSA claims, even though the agreement was not supervised by the Department of Labor or a federal judge. Defendants assert this position notwithstanding the fact that they alone drafted the agreement, which was not subject to negotiation. As Defendants are aware, Plaintiffs' FLSA claims cannot be waived, pursuant to the FLSA, absent a settlement approved by a district court or the United States

Department of Labor. Without such a settlement, Plaintiffs are free to bring an individual or FLSA collective action against Defendants. Accordingly, Defendants' agreements blatantly violate public policy and are unenforceable as a matter of law. As a result, Defendants' motion to dismiss and/or strike Plaintiffs' Amended Complaint must be denied.

STANDARD OF REVIEW

I. MOTION TO DISMISS

In order to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Arl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As the Supreme Court emphasized in *Twombly*, when a plaintiff's own allegations fail to state a claim, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quotations and citations omitted). A complaint is not required to have "detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (quotations and citations omitted). As the Supreme Court further explained, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Plaintiffs' Amended Complaint states a sufficient factual basis to establish that Plaintiffs are entitled to relief under the FLSA, and that Defendants are in violation of the FLSA. Thus, Defendants cannot meet their burden under Fed. R. Civ. P. 12(b)(6) and their motion to dismiss should be denied.

II. MOTION TO STRIKE

Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may strike a pleading, an insufficient defense, or any redundant, immaterial, or scandalous matter. Fed. R. Civ. P. 12(f). However, "[m]otions to strike are disfavored," *Roe v. City of New York*, 151 F. Supp. 2d 495, 510 (S.D.N.Y. 2001), and the Court must "deem the non-moving party's well-pleaded facts to be admitted, draw all reasonable inferences in the pleader's favor, and resolve all doubts in favor of denying the motion to strike." *Diesel Props S.r.L. v. Greystone Bus. Credit II LLC*, No. 07 Civ. 9580 (HB), 2008 WL 4833001, at *4 (S.D.N.Y. Nov. 5, 2008) (citations omitted); *see also Salcer v. Envicon Equities Corp.*, 744 F.2d 935 (2d Cir. 1984) (holding that a motion to strike should not be granted when there exists material issues that can only be resolved after the facts are known). Furthermore, a motion to strike on the grounds of immateriality should be denied unless "it can be shown that no evidence in support of the allegation would be admissible." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (citations omitted).

Under this standard, Plaintiffs' Amended Complaint must be viewed under the presumption that all allegations are true. Accordingly, since Plaintiffs' raise sufficient issues to establish violations of the FLSA by Defendants, the motion to strike should be denied.

ARGUMENT

I. THE SECOND CIRCUIT HAS DEEMED ESTOPPEL INCONSISTENT WITH BOTH THE LANGUAGE AND POLICY OF THE FLSA.

It is respectfully submitted that Defendants' estoppel argument must be denied out of hand, as this argument is opposite established case law in this circuit. Contrary to the arguments advanced by Defendants, the Second Circuit has deemed that the doctrine of estoppel is inconsistent with both the language and the intent of the FLSA. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946-947 (2d Cir. 1959); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 464-465 (S.D.N.Y. 2008).

Moreover, in *Karagozian v. Coty US, LLC*, No. 10 Civ. 5482 (RMB), 2011 WL 536423 (S.D.N.Y. Feb. 10, 2011), Judge Berman denied the portions of the defendants' motion that sought to dismiss the plaintiffs FLSA claims, where the plaintiff signed a stipulation that provided that it was in "full and final satisfaction of all unpaid wages." (*See* **Exhibit A**, Karagozian Stipulation.)[1] In his decision, Judge Berman reasoned that although the Karagozian stipulation was supervised by the *New York State* Department of Labor, it was not supervised by a district judge or the *United States* Department of Labor. *Id.* at *2. Therefore, Karagozian's FLSA claims could not be barred. *Id.*

Similarly, in the instant action, the Bank of America ("BOFA") severance agreement was not subject to Department of Labor or judicial approval. Therefore, since the agreement cannot serve to estop Plaintiffs from asserting FLSA claims, Defendants' estoppel argument must fail.

A. The BOFA Severance Agreements Are Void As A Matter Of Law.

Notwithstanding Defendants' arguments to the contrary, the Supreme Court has held that FLSA claims cannot be waived by private agreement. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981); *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) (refusing to allow a settlement to bar subsequent litigation where there was a bona fide dispute of FLSA coverage). Particularly in FLSA cases, courts have "refused to enforce wholly private settlements," *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986), especially where the release given in the settlements did not specifically mention a bona fide dispute over FLSA claims.

In that regard, it is well settled that "an employee may only waive a FLSA claim for unpaid wages or overtime pursuant to a judicially-supervised stipulated settlement or in a

[1] All exhibits are attached to the Declaration of Joseph A. Fitapelli in opposition to Defendants' motion to dismiss and/or strike portions of Plaintiffs' Amended Complaint.

settlement supervised by the Department of Labor." *Liu v. Jin Jin Commerce Corp.*, 08 Civ. 4199 (GBD), 2011 WL 135839, at *1 (S.D.N.Y. Jan. 10, 2011) (citations omitted); *see also Cortes v. Skytop Rest., Inc., No.* 09 Civ. 10252 (CM)(KNF), 2010 WL 4910242 (S.D.N.Y. Nov. 17, 2010) (holding that a settlement agreement agreed to by the parties, but not scrutinized for fairness by the court, was nullified).

In the instant case, the BOFA severance agreements are a purported "settlement" or waiver of Plaintiffs' FLSA claims. As such, they are subject to judicial supervision or Department of Labor approval before they can be enforced. Here, since the severance agreements were not supervised by the Department of Labor or reviewed by a district judge, the agreements cannot waive FLSA claims.

B. The BOFA Severance Agreements Are Void As A Matter Of Public Policy.

Defendants' severance agreements attempt to eliminate Plaintiffs' claims under the FLSA without Department of Labor or judicial approval. As a result, the agreements are void, as they contravene public policy. *See Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 Civ. 5755 (JHL), 2001 WL 1403007 (N.D.Ill. Nov. 9, 2001) (finding a release that purported to waive FLSA rights void as a matter of public policy).

Here, Defendants' settlement agreements not only attempt to waive individual FLSA rights, but they also purport to waive the right to participate in a FLSA collective action, neither of which can be waived by private agreement. Unquestionably, the settlement agreements were designed to mislead Plaintiffs, and similarly situated Senior Specialists, and to discourage them from asserting rights under the FLSA.

Finally, although it is Plaintiffs' position that the question of whether they are entitled to bring FLSA claims is purely a matter of Federal Law, Defendants' motion should also be denied if this Court were to apply the laws of the State of North Carolina, as Defendants suggest. Under an analysis of North Carolina Law, the choice of law in the BOFA Settlement Agreements, the Court of Appeals has held that, "the law will not allow one party to benefit directly or indirectly from a contract void as against public policy." *Richardson v. Bank of America, N.A.*, 643 S.E.2d 410, 430 (N.C.App. 2007) (quotation omitted). Since the severance agreements at issue seek to release FLSA claims, which they undoubtedly cannot do, the agreements should be found to be void as against public policy.

C. **The Plain Language Of Defendants' Agreements Excludes Claims That Cannot Be Waived As A Matter Of Law.**

Even assuming, *arguendo*, the validity of the BOFA Settlement Agreements, it should be noted that the plain language of the agreements invalidates any purported waiver of Plaintiffs' FLSA claims. Contractual agreements are interpreted according to their plain meaning. *Simpkins v. Pulte Home Corp.*, No. 6:08 Civ. 130, 2008 WL 3927275, at *10 (M.D.Fla. Aug. 21, 2008) (*citing Kruse, Inc. v. Aqua Sun Ivs., Inc.*, No. 6:07 Civ. 1367, 2008 WL 276030, at *5 (M.D.Fla. Jan. 31, 2008) (a release of claims should be interpreted according to its plain meaning). The agreement in the instant case specifically excludes from release "any right or claims, whether specified above or not, that cannot be waived as a matter of law pursuant to federal, state or local statute." (*See* Defendants' Motion, Exhibits A and B ¶ 3(e).) Here, because the plain language of the agreement states that it does not waive any claim that cannot be waived, and "[b]ecause the right to receive damages under the FLSA cannot be waived," the most plain and unambiguous interpretation of the release is that it does not apply to FLSA rights. *Simpkins,* 2008 WL 3927275, at *10; *see also Glewwe v. Eastman Kodak Co.*, No. 05 Civ. 6462 (JT), 2006 WL 1455476 (W.D.N.Y. May 25, 2006) (FLSA collective action permitted to proceed even though plaintiffs had signed private severance agreements which expressly waived FLSA claims). Therefore, the release of FLSA rights in the BOFA Severance Agreements can be invalidated by the plain meaning of the agreements' language.

II. PLAINTIFFS' COLLECTIVE ACTION CLAIMS SHOULD NOT BE DISMISSED OR STRICKEN BECAUSE THE ABILITY TO PURSUE A COLLECTIVE ACTION UNDER THE FLSA IS A SUBSTANTIVE RIGHT THAT CANNOT BE WAIVED.

A. The BOFA Severance Agreements Do Not Waive The Right To Bring A Collective Action Under The FLSA.

Absent a settlement approved by a district court or the United States Department of Labor, an employee cannot waive his or her rights under the FLSA. Included in this prohibition is an employee's substantive right to pursue a FLSA claim by collective action. 29 U.S.C. § 216(b). Section 216(b) of the FLSA currently states:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Id.

Defendants argue that Section 216(b) of the FLSA provides only a procedural mechanism by which an individual can pursue a collective action. (*See* Defendants' Memorandum of Law in Support of Defendants' Motion, Section II). Contrary to this position, the fact remains that there exists no controlling case law which states that a right to bring a collective action can be waived under the FLSA. *See Simpkins*, 2008 WL 3927275, at *10 (finding no legal authority to support the idea that an employee can waive the ability to bring a FLSA collective action). Rather, courts which have reviewed factual situations similar to the case at bar have found waivers of FLSA collective actions invalid.

In *Simpkins,* plaintiffs signed severance agreements in which they agreed not to sue their former employer for "any waivable claim." *Id.* at *9. When plaintiffs brought suit to recover unpaid overtime pay under the FLSA, defendant contended that plaintiffs had waived their right to bring a FLSA collective action claim. *Id.* at *10. Defendant further reasoned that the "'right' to bring a collective action may be waived because it is not a substantive right under the FLSA." *Id.* The court, however, found this argument meritless. According to the district judge, outside the realm of arbitration there exists "no legal authority for [defendant's] assertion that an employee can waive the ability to bring an FLSA collective action while maintaining the ability to pursue an individual action in court." *Id.* Accordingly, the court in *Simpkins* held that the severance agreement did not prevent plaintiffs from bringing a collective action claim under the FLSA. *Id.*

Similarly in *Ritzer v. UBS Fin. Serv., Inc.*, No. 2:08 Civ. 01235 (WJM)(MF), 2008 WL 4372784 (D.N.J. Sept. 22, 2008), current and former UBS technical support associates signed offer letters stating that they "waive[d] any right to commence, be a party to or an actual or putative class member of any class or collective action arising out of or relating to [their] employment with the firm." *Id.* at *4. Similarly, two putative class members elected to participate in UBS's Voluntary Separation Program, and signed agreements which stated that they "represent[ed], warrant[ed] and agree[d]" that they were "paid and/or ha[ve] received all . . . compensation, . . . [and] wages (including overtime) . . . to which [they each] may [have] be[en] entitled, . . . and that no . . . wages . . . are due to [them]." *Id.* Finding that FLSA rights "cannot be abridged by contract or otherwise waived," the court denied defendants' motion to preclude certain class members and found that it was appropriate to conditionally certify the action as a collective action under the FLSA, notwithstanding the signed offer letters and Voluntary Separation documents. *Id.* (internal quotations and citations omitted).

As illustrated by the case law above, Defendants' argument that collective FLSA actions can be waived lacks merit. Without a settlement approved by a district court or the United States Department of Labor, Plaintiffs' right to bring a FLSA collective action remains a substantive right that cannot be waived.

B. Defendants' Authority Lacks Merit And Fails To Address The Issue At Bar.

Defendants' cite several cases which take the position that an employee may waive their right to bring a FLSA collective action. Defendants' reliance on these cases fails to address the issue at bar because they specifically address FLSA collective actions with regard to arbitration agreements. "[O]utside the context of arbitration, there is no legal authority for [the] assertion that an employee can waive the ability to bring a FLSA collective action while maintaining the ability to pursue an individual action in court." *Simpkins*, 2008 WL 3927275, at *10; *see also Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 (1st Cir. 2007) (distinguishing arbitration cases as irrelevant to whether FLSA collective actions may be waived). Therefore, these precedents do not apply to the instant matter and should be disregarded by the court.

Defendants also rely on *Kelly v. City and County of San Francisco*, No. 05 Civ. 1287 (SI), 2008 WL 2662017 (N.D.Cal. June 30, 2008), for the proposition that employees may waive their right to participate in a FLSA action by private agreement. However, Defendants' reliance on this case is incorrect. *Kelly* erroneously cites to a single case, *Jimenez v. JP Morgan Chase & Co.*, No. 08 Civ. 0152 (WMC), 2008 WL 2036896 (S.D.Cal. May 8, 2008), for the notion that a party may waive the right to bring a FLSA collective action. However, this was not the holding reached in *Jimenez.* In *Jimenez,* a severance agreement carved out the right to bring an individual FLSA claim. *Jimenez*, 2008 WL 2036896, at *1. Declining to decide whether a collective FLSA action could still be brought, the court instead concluded that a plaintiff's "suitability to represent a class will be determined at the certification stage," *Id.* at *6 FN6, and "decline[d] to decide these issues under the instant Rule 12(b)(6) motion." *Id.* at *6; *see also Simpkins*, 2008 WL 3927275, at *10 (disregarding defendant's use of cases based on *Jimenez*). Therefore, because the reasoning in *Kelly* is flawed, Defendants' reliance on it is mistaken.

Defendants' reliance on *Lu v. AT & T Services, Inc.*, No. 10 Civ. 05954 (SBA), 2011 WL 2470268 (N.D.Cal. June 21, 2011), is similarly misguided. In *Lu,* the court found that a severance agreement which waived any claims plaintiff had against defendants, including FLSA claims, was valid. *Id.* The severance agreement specified that all wages and overtime owed to plaintiff had been paid, and that plaintiff's right to participate or initiate any class or collective action against defendants had been waived. *Id.* at *1. However, the reasoning that the court used to arrive at this holding is incorrect. In that regard, the court separated the "substantive" rights of the FLSA, namely an individual's rights under the FLSA, and "procedural" rights, namely the right to bring a collective action under the FLSA, and concluded that the restriction against waiving FLSA rights only applies to an employee's substantive rights. *Id.* at *3.

What the *Lu* court failed to realize, is that these rights are one and the same: one of the substantive rights provided under the FLSA is the right to bring a collective action. *See* 29 U.S.C. 216(b). While the right to proceed in a *class* action in other cases is a procedural right (the ability to do so coming from the Federal Rules of Civil Procedure), the right to bring a *collective* action is not embodied in a separate text or book of rules. Rather, it is found within the very words of the statute itself, and therefore, it is part of the substantive rights conferred by the FLSA.

Defendants cite cases which are improper and distinguishable from the case at hand. As such, their authority is not binding on this Court in the instant action. In this respect, Defendants' contention that Plaintiffs are able to pursue individual claims, but not collective action claims, under the FLSA is unwarranted. As a result, this matter should be permitted to continue as a collective action under the FLSA.

C. **Waiver Of Collective FLSA Rights Is Contrary To Public Policy.**

The principal congressional purpose in enacting the FLSA was to "protect all covered workers from substandard wages and oppressive working hours, [and from] 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrentine*, 450 U.S. at 739 (*citing* 29 U.S.C. §202(a)). Further, the FLSA was meant to "offset the superior bargaining power of employers both for particular employees at issue and broader classifications, and to offset the resulting general downward pressure on wages in competing businesses." *Skirchak*, 508 F.3d at 58 (*citing Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985)); *see also Gentry v. Superior Court of Los Angeles*, 42 Cal. 4th 443, 456 (Cal. 2007) ("wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare.").

Allowing the waiver of FLSA collective rights "undermine[s] the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of . . . overtime laws." *Gentry*, 42 Cal. 4th at 450. If Defendants are permitted to enforce the terms of the severance agreements in the instant action, Defendants would not only prohibit Plaintiffs from bringing individual claims under the FLSA, but they would also prevent other similarly situated employees from learning about, and having the opportunity to enforce their rights. Preventing potential Plaintiffs from exercising their rights under the FLSA does nothing to protect the "general class of employees in whose interest" the FLSA was passed to protect. *Brooklyn Savings*, 324 U.S. at 713.

Additionally, in *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011), Judge Wood analyzed whether a FLSA class waiver provision in an arbitration agreement was enforceable. The court found that it would be "prohibitively expensive for [plaintiff] to pursue her statutory [FLSA] claims on an individual basis," *Id.* at 549, because "the enormous costs and fees attendant to prosecuting her claim on an individual basis would effectively prohibit her from bringing suit at all." *Id.* at 548-549. Since the *Sutherland* plaintiff was owed $1,867.02 in unpaid overtime wages, the Court agreed that it would be "prohibitively expensive for her to pursue her statutory claims on an individual basis," *Id.* at 549, because the high costs of litigation would deny her the ability to afford an attorney. *Id.* at 552. However, "if [plaintiff] could aggregate her claim with the claims of others similarly situated . . . she would have no difficulty obtaining legal representation . . . because class proceedings 'achieve economies of time, effort, and expense.'" *Id.* at *554 (*citing Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 616 (1997)). For these reasons, the Court found the class waiver provision in the arbitration agreement to be unenforceable.

As a result, Plaintiffs' right to bring a FLSA collective action remains necessary in order to guarantee Plaintiffs' ability to bring such a claim. In this respect, upholding a purported waiver of collective FLSA claims is tantamount to upholding a waiver of individual FLSA rights, which does not comport with public policy.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss and/or motion to strike Plaintiffs' Complaint in its entirety.

Dated: New York, New York
September 19, 2011

Respectfully submitted,

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